

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
(a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

BRIEF SUBMITTED BY
SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST,
AMICUS CURIAE.

Filed

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F. D. Monckton,
Clerk.

SHIPOWNERS' ASSOCIATION OF THE
PACIFIC COAST,

By Oliver J. Olson,
Its President.

W. F. Sullivan,
Its Proctor.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2728

IN THE

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*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The undersigned, the Shipowners' Association of the Pacific Coast, respectfully petition your Honorable Court that it grant the pending petition for rehearing in the above entitled cause for the following reasons of moment to all persons commanding vessels at night under the Rules of Navigation controlling in Inland Waters, to wit:

Because the opinion of this court, and the opinion of the District Court below, hold that the commander of a steamer on the waters of Puget Sound, on a dark night, with a moderate wind blowing towards him, who hears a whistle from a vessel ahead, which he believes to be approaching, but whose side lights are invisible, must navigate his vessel on the theory that the approaching vessel is within two miles—the distance within which Article 18, sec. 1, says they must be visible—and not rely upon the presumption of law that the whistle came from a greater distance than two miles, and that the side lights of the opposing vessel were properly not visible.

Because, restating the above proposition, this court has held that a commander in such a situation must disregard the presumption laid down in the cases later cited that the other vessel's manoeuvre and condition are presumed, even to the very jaws of the collision, to be proper, or will be made so, and must navi-

gate his vessel on the theory that the other vessel's manoeuvre is improper, and give signals and commands based on the assumption of this impropriety.

Because this court has placed on the innocent vessel the useless burden of blowing four whistles to tell a vessel, charged with knowledge of her invisible lights, that her lights are, in fact, invisible; whereas the guilty vessel should have the burden of blowing four blasts to advise the innocent vessel of her ignorance and hence the danger of collision, as soon as she receives no response to her passing signal.

Because this court, without considering the point, decides that where two steam vessels are "meeting" and the commander of one, not seeing the other but hearing her whistle and believing her approaching, though he cannot tell her course and position, must, nevertheless, blow the four blasts provided in Rule 3 of Article 18 of the Inland Rules, despite the positive command of Rule 9 that the signals for steam vessels so meeting "are never to be used except when the steamers are in sight of each other".

And, enforcing the last proposition, because, it seems to us that the court has failed to consider the reasons for prohibiting any of the signals provided in Article 18 (including four whistles) to be used by approaching steamers,

"except when the steamers are in sight of each other, and the course and position of each can be

determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights”.

Rule IX of Article 18 of the Inland Rules.

And because, as it seems to us, the court has failed to realize the confusion and the dangers which must necessarily arise if steamers are to be permitted to depart from these rules.

I.

The Virginian was compelled to assume that the Strathalbyn's lights were legally invisible until she positively knew to the contrary.

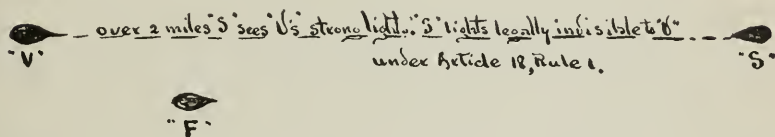
We are advised that the record in this case is long and voluminous and that much of the evidence is contradictory. We also understand how those without experience in the actual navigation of vessels can quite reasonably fail to take into consideration all of the varying elements which face a pilot at night, who must control his actions by the many rules prescribed by law to govern the many situations and combinations of circumstances which such navigation involves.

A reading of the opinions of both the lower and higher court here convinces us that they have established rules of navigation which will be seriously embarrassing to inland navigation in the future, and which contradict the rules as they have always been interpreted.

If one of us were on the bridge of the Virginian, approaching Vashon Island which has various lights

on shore indistinguishable from a masthead light* and saw the cabin lights of the Flyer, which has passed us and is 1500 feet ahead and on our starboard bow, and heard a whistle from ahead which is responded to by the Flyer, he would have three legal explanations for the invisibility of the unseen vessel's side lights, no one of which would call for either the danger signal or reversing on our part.

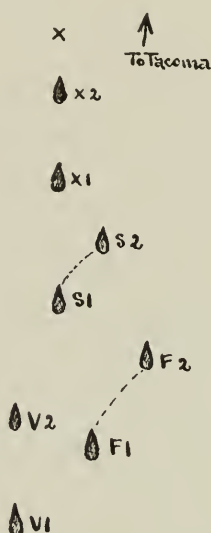
These three explanations are the following:



1. The invisible steamer coming from Tacoma, which we will call the Strathalbyn, has been watching the strong side lights of the Flyer and the Virginian for some time and has concluded that she has come near enough to exchange signals, whereas she is in fact over two miles distant and her side lights are legally invisible to us. They have already come within the range of visibility of the Flyer. This conclusion involves no wrong on the Strathalbyn's part as it is impossible to judge accurately the distance of observed side lights. They may be weaker lights nearer by or stronger lights farther off. Under Rule 9, Article 18, we are not permitted to respond with a passing signal because of her

* The opinion of the District Court quite properly holds that a pilot seeing all these lights cannot be compelled to make any assumption as to whether one is in fact a mast-head light.

invisibility; nor yet are we compelled to reverse because she is too far distant; nor yet are we compelled to enquire by four blasts (even if allowed to do so when the other vessel is invisible) because, being two miles distant, there is no immediate danger. We are certainly entitled to assume this proper explanation and to wait a second whistle before stopping her engines and a third before reversing.



2. The Strathalbyn, instead of approaching, is bound for Tacoma ahead of both the Virginian and the Flyer, and has also ahead of her another vessel (we will call the X), also bound for Tacoma. The Strathalbyn desires to overtake and pass the X and blows to her one whistle. The Flyer, a fast vessel, desires to overtake the Strathalbyn and blows one whistle and the Strathalbyn after a delay accepts the offer with one whistle. The Strathalbyn getting no reply from the invisible X blows a second signal to her. The Virginian,

not desiring to overtake these unseen vessels, stops her engines and on hearing another whistle reverses.



3. The Strathalbyn, bound for Tacoma ahead of the Virginian and Flyer and hence invisible to both, sees the X on her starboard bow bound on a crossing course to Des Moines, a port on the east shore of the Sound, and blows one whistle to the X under the starboard hand rule (Article 18, Rule 1). The Flyer, a fast vessel, thus discovering the Strathalbyn, blows one whistle to show she is overtaking the Strathalbyn. The Strathalbyn, after a delay, consents by a one whistle blast. We, on the Virginian, not desiring to run into a maneuver of unseen vessels, however proper, stop our engines and on hearing no response from X to the Strathalbyn and another whistle from X, reverse.

Out of each one of these three sets of maneuvers come the exact whistles and the same lights—or rather absence of lights—which were actually observed by the pilot of the Virginian. They are three situations not unlikely to occur on the voyage in question. Certainly there is nothing unusual in four vessels sailing on the

same route to Tacoma; and nothing impossible in three vessels sailing to Tacoma being crossed by a vessel sailing to Des Moines. In adopting the conclusion that any one of them was the situation actually before the *Virginian*, she would be assuming that the invisible vessels were acting within the statute. In concluding that any one of them was coming down on her with obscured side lights, she would be assuming that the opposing vessel was violating the law.

The *Virginian's* pilot guessed that the invisible steamer was approaching and thereupon was reasonably entitled under the rules to assume the first of these maneuvers. The confusion of mind to which he testifies so clearly at pages 1197, 1198, 1160 and 1182 of the apostles must have been in part caused by the subconscious knowledge that either of the other two might properly be transpiring. Stopping his vessel seems the very limit of cautious conduct in this situation.

Even if these three hypotheses to *legally* explain the unseen vessel, involved exceptional conditions, it cannot for a moment be said that they compare in this unusual character with the hypothesis that the *Strathalbyn* was an oncoming vessel attempting to navigate Puget Sound with her side lights invisible to a vessel ahead. It must always be remembered that almost every vessel bound for Tacoma which the *Strathalbyn*, sailing from Tacoma, would meet in the waters in question, would come on her on the same course and that with her obscured lights every passing signal given by the *Strathalbyn* and heard by them would be an invitation to a collision.

As we understand the ruling of this court, the Virginian's pilot was in fault for not navigating his vessel on the theory that the Strathlbyn was egregiously violating the law and coming down on her with her side lights so obscured. It holds that stopping and waiting the development of maneuvers thus properly indicated was not enough and that he should have *reversed his engines long before he could have actually known that the opposing vessel was not obeying the rules.*

As we understand the decisions in the following cases, we are compelled to assume that the opposing vessel is complying with the law or that she *will* comply with the law and correct any error on her part, even to the very jaws of the collision.

“Until the last moment the tug had a right to assume that she (the opposing vessel) would comply with the rules.” * * *

“If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent.”

The Delaware, 161 U. S. 459 at 469.

“Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her

course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger."

The Victory, 168 U. S. 410 at 426.

"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules *and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules.*" (Italics ours.)

Belden v. Chase, 150 U. S. 674 at 699.

"Suppose, when he first discovered that there was something, he could not tell what, wrong with the *Acilia's* whistle, he had then either stopped and reversed, or starboarded his helm, and the *Acilia* had then obeyed the law and ported, and a collision ensued; would not the *Acilia's* proctor be justified in urging: 'You should never have presumed that we were going to act unlawfully. We never gave you two blasts, and why should you infer that we did not mean to keep to our side of the channel? If you had obeyed the rule, and ported, and kept on, instead of stopping, merely because our whistle was out of order, there would have been no collision.'"

The Acilia, (C. C. A.) 120 Fed. 455, at 460-461.

"The *Rome* was not bound to anticipate that the *Mack* would not act lawfully and comply with her agreement, and so long as there was apparent reasonable opportunity for her to swing and clear the *Rome* the latter might assume that she would do so."

Lake Erie Transp. Co. v. Gilchrist etc., 142 Fed. 89, at page 95.

This court in its opinion has not mentioned any of these decisions. It does not mention and apparently has not thought of, the Virginian's pilot's right to assume that the Strathalbyn's lights were *legally* invisible within the rules. If it stands we are violating the law unless we always guess rightly that a whistling vessel invisible on a clear night is going to ram us; if these other cases stand we are guilty if we fail to assume that she is obeying the rules and will not ram us.

We therefore urge that you grant a rehearing, not alone for the exoneration of the particular pilot, but for clearing up an uncertainty which must exist in our minds under this ruling whenever we hear a whistle from a vessel whose lights are invisible to us.

Rule 9 requires that the four blast signal of Rule 3 shall be given only when the opposing vessel's lights are in sight and her course and position therefore can be made determinate by her passing or other signals. The four blasts cannot help to clear up the "doubt" and "failure to understand", referred to in Rule 3, if the other vessel is not in sight, for it is only by combining sight and the whistles that intention or course can be communicated.

The four whistle inquiry signal of Rule 3, Article 18, is to be used by a vessel "in doubt", "when steam-vessels are approaching each other, and either vessel fails to understand the course or intention of the other, from any cause".

It is apparent that when, in the night time, vessel A is entirely out of sight of vessel B, the whistles from A will not tell B either A's course or her intention with regard to keeping or changing it. Mere sound cannot do this. It cannot disclose how far off the other vessel is, nor her direction within a wide radius, nor her previous course or conduct from which her passing or other whistle indicates she is about to make a change.

Visibility alone can make an intelligible answer to the four blast enquiry. We therefore find Rule 9 providing that:

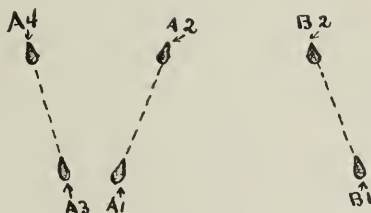
“The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each *can* be determined in the day-time by a sight of the vessel itself, or by night by seeing its signal lights.”

Combined Rules 3 and 9 say to the pilot: “If you fail to understand a vessel's course or intention, you may blow four blasts and thus ask her to clear up the doubt. As she cannot show her course or intention when you cannot see her, you must not blow them. You must wait till she is in sight and her course *can* be determined by combining what you see of her with what you hear, before blowing four whistles will bring any answer which will clear up your doubt.”

Judge Cushman fails entirely to realize this real meaning of the two rules and falls into the fatal error of supposing the mere ability to see a vessel's light at

night will enable one to determine her course and position (Apostles 1433). A very little thought will show the fallacy of his contention.

If the vessel be on a course crossing that of the observing vessel her light will seem to traverse the same amount of horizon as if on a diverging course. For instance:



B sees A's green light on her port hand at some distance. It will seem the same whether moving from position A¹ to A², or from position A³ to A⁴. It is only when A blows her one whistle that B learns that A is on course A¹ to A², and hence crossing B instead of steaming parallel or slightly away from her on course A³-A⁴.

In other words, seeing a vessel's light does not determine her course and position, but if the light is in sight these *can* be determined, i. e., by her whistles.

If, when B's red light is seen by A on her starboard hand, B blows two signals, doubt at once arises as to her course and intention. A will "fail to understand" it because, under Article 18, Rule 1, B's red light would require her to keep her course and speed, while her two blast signal indicates she will change her course to port. A hence blows four whistles, showing

her doubt and calling upon B to give a further whistle, properly explaining her intention and course. This is the legitimate and universal use to which the four blasts are put.

The above shows some of the reasons why the enquiry signals should be blown when the other's light is visible. There are also certain dangers in blowing the four whistles when the other vessel is out of sight, which warrant the prohibition against blowing them at that time.

Suppose two sea-going steam vessels, steaming on inland waters, are so maneuvering on crossing courses, at an acute angle, that a vessel approaching astern does not see any of their lights and are in this position:



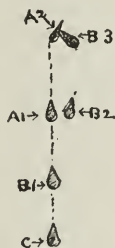
That is to say, A shows her green light to B's red and their courses cross at X. C, more than 2 points abaft their beams, hears the one blast signals of the invisible vessels. Suppose she blows four whistles of enquiry, although she has no part in the maneuver between the other two vessels, and suppose, as is quite likely, that her whistle is of the same type as used by the others.

A and B, who can see C, and know that as a following vessel she has no interest in the maneuver,

and hence no reason to blow any signals, will at once assume that something is wrong with the other ship in the crossing maneuver and start backing or otherwise changing courses. Is it not apparent that the use of the four whistles by a vessel who would only have occasion to use them on the assumption that the other vessels were violating the law and not showing lights when approaching is the proximate cause of any collision resulting from the confusion?

If this is correct, then it is a perfectly clear explanation for the requirement of Rule 9 that these signals for vessels meeting, passing or overtaking, shall be used only when the vessels are in sight of one another.

Another, and even more likely cause of disaster, if a vessel is allowed to use the four blasts where vessels invisible to her are maneuvering and giving signals because she believes one of them is "approaching" and Rule 3 applies, is the following:



A is followed by B, who asks by her one blast and receives permission by A's one blast, to overtake and pass her. C, who is astern of B, hears the whistle from the invisible vessels before her, imagines one of them is approaching her and, under Rule 3 blows

four blasts just as they are passing. A believes B is blowing them, B that A is blowing them, and both reverse. B has a left handed propeller, like the "Geo. W. Elder", and A a right handed one, like the "Beaver". Reversing sends them on curving courses towards one another as they advance under their remaining momentum and they collide.

Is it not apparent that these four-blast whistles to vessels not visible is the proximate cause of the loss? Is it not apparent that, if C had acted as if the others were obeying the law, i. e., under the supposition that the invisibility was *legal* and hence the unseen vessels not approaching, she would not have blown the four whistles and there would have been no collision?

In inland waters, where traffic is congested, indiscriminate blowing of four whistles whenever a signal is heard from an invisible vessel would not infrequently cause disaster.

This court has held in its opinion, and the lower court has held in its opinion, *both squarely*, that the Virginian was in fault for not blowing four whistles to the invisible Strathalbyn. This court, despite the gravity and importance of its ruling, gives no reasoning on it whatsoever. The lower court fails utterly to see the distinction between the vessel being in sight, so her course and position *can* be determined, as required by Rule 9, and her conduct when thus in sight being so contrary to the rules that her course and intent cannot be understood within Rule 3.

It is therefore prayed that there be a rehearing of this case, and that the court in determining it will take into consideration:

1. The embarrassing position of a pilot navigating in the darkness who, when he guesses rightly that an invisible whistling vessel is approaching, is compelled to assume that she is so near that there is danger of collision, when she can be so only if violating the law as to her lights; and at the same time is bound to assume under the decisions until she is so close that she cannot extricate herself if unaided, that she is not violating the law, and that her lights are proper;

2. And will construe Rule 9 as it plainly reads, namely, to prohibit the use of the four whistle blast except when the other vessel is in sight.

Or, if it will not decide these two matters, as we have here very respectfully suggested we think should be, will at least make its upsetting of these practices of pilots so clear and fully considered in its opinion that we may safely follow it.

Dated, San Francisco,

August 22, 1916.

Respectfully submitted,

SHIPOWNERS' ASSOCIATION OF THE
PACIFIC COAST,

By Oliver J. Olson,

Its President.

W. F. Sullivan,

Its Proctor.

